



trial, (2) in overruling the defendant's demurrer to the indictment, (3) in denying defendant's motion for directed verdict made at the close of the entire case, (4) denying defendant's motion in arrest of judgment, and (5) in refusing to give numerous charges requested by the defendant (R. 307 et seq.). In order dated July 30, 1943, the Court ordered that the 10797 cut diamonds of appraised value of \$28,014, being an exhibit in this case, were to be delivered to the Collector of Customs to be safely kept pending a final disposition of the rights of the various parties to said diamonds (R. 323-344).

### **REASONS FOR GRANTING THE WRIT.**

Whatever may be the real facts as to manner in which the diamonds came into the possession of petitioner in Havana, Cuba, a serious question is presented in several aspects of this case bearing on the intent of petitioner which should be settled by this court. In refusing to grant certain charges requested by plaintiff, thorough consideration does not appear to have been given to the question of whether even though an original intent to smuggle merchandise into this country had been in mind an actual smuggling has not been committed if before leaving the customs station the dutiable goods have been voluntarily delivered to a customs officer for inspection and determination of amount of duty. It is important, also, to have a ruling on the point whether a baggage declaration and entry form is the exclusive method of presenting dutiable merchandise to the attention of customs officials.

### **BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.**

This is not a case where as so often occurs in attempts to smuggle narcotics into this country the drugs are carefully hidden from the inspection of the customs officials and are discovered only after a careful examination of the person

or baggage of the incoming passenger, or, in the case of crew members, hidden in the vessel itself. In the instant case petitioner ostentatiously displayed cigars in excess of those listed in his baggage declaration and in addition handed to the customs officers the various packages of diamonds. He was still inside the customs station and it seems immaterial whether he handed the packages of diamonds to the first customs officer who examined his bags or, as he actually did, gave the diamonds to the final and last customs guard at or near the exit of the station. Conceding for the sake of argument that at the time he filled out the baggage declaration at the steamship office when he took passage at Havana he had the intent to avoid payment of duty on the diamond nevertheless when and if he did change his mind he had not smuggled or attempted to smuggle the diamonds into this country. The discovery of the diamonds in this case was not the result of a search by customs officials, as in the case of *Ritterman v. United States*, 273 U. S. 261, where a deliberate attempt was made to enter with a quantity of diamonds without payment of duty, which diamonds were finally found by a customs guard hidden in a bag during the time the traveler was undressing before the guard. In that case Mr. Justice Holmes, in his opinion stated that the traveler could not purge himself of the consequences of his fraud by confessing when he saw that he was on the point of being discovered or, as might have been found, after he had been. To the same effect is the case of *Newman v. United States*, 276 F. 798. However, in *Keck v. United States*, 172 U. S. 434, the facts are similar to those present in the instant case. The court stated that mere acts of concealment of merchandise do not, taken by themselves, constitute smuggling and that if the merchandise is delivered to the customs officer before passage through the lines of the customs authorities there is no offense under the law. See, also, *United States v. One Pearl Chain*, 139 F. 510; *United States v. One Pearl Necklace*, 111 F. 164; and *United States v. One Trunk*, 184 F. 317.

The *J. Duffy*, 14 F. (2d) 426, reversed in *The J. Duffy and United States v. 2802 cases of Scotch Whiskey*, 18 F. (2d) 754, had reference to the capture of a British schooner within the territorial waters of the United States and charged with attempted smuggling, which case is distinguished from the case of *Keck v. United States*, *supra*.

### CONCLUSION.

For the reasons stated it is respectfully submitted that this petition for writ of certiorari should be granted.

BRIEN McMAHON,  
*Counsel for Petitioner.*